UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF AND
PARTIAL SUMMARY RELIEF DENIED: May 9, 2007

CBCA 439

ACQUEST GOVERNMENT HOLDINGS U.S. GEOLOGICAL, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Michael J. Norton and Lindsey N. Rothrock of Burns Figa & Will P.C., Greenwood Village, CO, counsel for Appellant.

M. Leah Wright, Office of General Counsel, General Services Administration, Auburn, WA, counsel for Respondent.

Before Board Judges **PARKER**, **GILMORE**, and **GOODMAN**.

GILMORE, Board Judge.

This appeal involves a dispute between Acquest Government Holdings U.S. Geological, LLC (Acquest or appellant) and the General Services Administration (GSA or respondent), under a lease agreement which required appellant to construct a facility and lease it to respondent for a period of twenty years. The dispute centers around the construction of the facility's animal holding rooms. Appellant claims that (1) under the design specified in the solicitation for the animal holding rooms, it was impossible to meet the performance requirements for heating and ventilation of the rooms; (2) it was required

to perform additional work and install additional equipment in an attempt to meet the performance requirements and subsequent design changes made by respondent; and (3) respondent owes the rent that it withheld while the additional work was being performed, and operating expenses during that period. Appellant's claim is in the approximate amount of $936,000. Appellant initially claimed that GSA also owed it additional costs under the Prompt Payment Act, but has since withdrawn this claim.

Respondent answered that the design features in the solicitation and drawings were developed only to the 30% level, and that appellant was ultimately responsible for designing the facility to the 100% level; and that GSA is not liable for any extra costs appellant expended to bring the facility into compliance with the performance requirements. Respondent argues that its reduction of the rental amount was justified because GSA was unable to occupy the holding rooms while corrective work was being performed.

The parties have filed cross-motions for summary relief. Respondent has moved for partial summary relief alleging that the material facts are undisputed and that it is entitled to judgment as a matter of law on the issues of whether GSA warranted the initial design for the animal holding rooms and whether the specifications were defective. It contends that the undisputed facts establish that GSA, in its solicitation for offers, set forth specifications to a 30% design level, representing only a "design intent," and that appellant was responsible for designing the building, including the animal holding rooms, to the 100% design level to meet the performance requirements.

Appellant asks the Board to deny respondent's motion for partial summary relief and to enter judgment in its favor, contending that the material facts are undisputed and show that (1) GSA specified design features for the animal holding rooms with which appellant had to comply; (2) appellant complied with the design specified and was unable to achieve the performance requirements; and (3) GSA subsequently changed the design requirements in order to achieve the performance requirements, which required appellant to upgrade the originally installed equipment.

For the reasons below, we find that there are material facts in dispute and deny both respondent's motion for partial summary relief and appellant's motion for summary relief.

Undisputed Facts

Based upon the pleadings and documents in the appeal file and submitted in the parties' cross-motions for summary relief, the following facts appear to be undisputed.

1. On or about November 1, 2000, the Government issued Solicitation for Offers (SFO) no. 001-03 for the construction and lease of office and related space in the Natural Resources Research Park in Fort Collins, Colorado. Appeal File, Vol. 2-1, Exhibit 15 at 11. On December 6, 2000, the Government issued its first amendment to the SFO, which incorporated the design drawings. Appeal File, Vol. 1, Exhibit 3. Offers were due on February 12, 2001.

2. On February 27, 2001, GSA awarded a twenty-year lease to appellant for 99,150 square feet of office space and 103 parking spaces at the research park at an annual rent of $2,468,835, which included the cost of tenant improvements of $3,999,771 amortized over the term of the lease. The lease agreement incorporated the SFO and its amendments. The lease was to provide office space and laboratory and industrial space in a newly constructed building able to meet the requirements set forth in the lease. The office and laboratory space included ten animal holding rooms, containing approximately 3979 square feet, which required special temperature, humidity, and air velocity control measures. The parties' dispute involves appellant's construction of the animal holding rooms. Appeal File, Vol. 2-1, Exhibit 15.

3. The space was to be provided in a phased occupancy with the biological laboratories and animal facilities not requiring completion until July 1, 2002. Commissioning and testing of the laboratory systems could be completed post-occupancy and were required to be operational no later than August 1, 2002. Appeal File, Vol. 2-1, Exhibit 15 at 241.

4. Section 2.3 of the SFO, Preliminary Design Concept, states:

> All offers shall meet the requirements of this SFO and the associated schematic design drawings. Any proposed variances must be submitted with a specific description in writing with the offer. If the Government receives no variances, then the offer will be considered to meet all the requirements of the SFO and associated schematic.

Appeal File, Vol. 2-1, Exhibit 15 at 16.

5. Section 11.1 of the SFO, Drawings, states:

> Drawings will be provided as part of the second phase of the solicitation. The drawings to be provided are design intent only. The drawings represent the programming, space planning, architectural and important engineering aspects of the building. Preparation of complete bid and construction documents is the

> responsibility of the successful offeror. The drawings provided do not represent full engineering analysis or code compliance. It will be the responsibility of the successful offeror to provide complete engineering analysis and code compliance.

Appeal File, Vol. 2-1, Exhibit 15 at 205.

6. The mechanical, electrical, and plumbing portions of the drawings contain the following language in the bottom corner:

> This drawing, with equipment and system component locations, types, and sizing is meant only to indicate design intent and approximate scope of work, the offerers [sic] engineers shall be responsible for the final scope definition and design, as well as final equipment selection, sizing, and performance.
>
> Note: These drawings are supplemental to the SFO and are not intended to be used separately. Drawings are for design intent only and are not to be used for construction.

Appeal File, Exhibit 56.

7. The architectural portion of the drawings does not contain the above language. The architectural portion of the drawings, on the page titled "Lower Level--East Wing," depicts the architectural design for the animal holding rooms with an attached note directed at wall construction. The legend to that attached note stated: "Concrete masonry unit to structure with furring and gyp. on finish side to ceiling. No gyp. or furring necessary @ animal ecology lab." Appeal File, Exhibit 56.

8. Part Two of the SFO, Section 4, addresses buildout and construction. Section 4.1, Design Concepts Development, provides in pertinent part:

> After award, design development will be in accordance with the specific solicitation requirements. The Contracting Officer shall have the right to reject any aspect of subsequent design development which varies from the concept and which would adversely affect the government's use and occupancy of the space or the Government's other interests in the building. Evolutionary adaptations or changes can be proposed by either party to improve the design, subject to the Contracting Officer's approval.
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> . . . .

> Design development after award will not only be in accordance with the specific solicitation requirements, but also a direct extension of the original design concept. The further design development shall retain all the fundamental and physical characteristics of that concept. Neither party will unreasonably withhold such acceptance of demonstrably beneficial design adaptations of the concept which would not measurably increase the costs of construction, operation or occupancy of the space or building and which would not decrease the utility of the space or building to either party.

Appeal File, Vol. 2-1, Exhibit 15 at 20.

Section 4.1 further requires that the lessor submit 50%, 90%, and 100% design drawings for government review. The lessor was to submit drawings coordinated with the mechanical, electrical, and space drawings, and the 50% design submission was required to include calculations for structural analysis and for mechanical, plumbing, and electrical systems to justify sizes of the proposed systems. The intent at the 50% design stage was to "progress the original design drawing information through design development process to the point where only construction details remain to be completed: i.e., complete intended design of the facility shall be shown." The 90% design stage required appellant to submit a complete set of construction documents, and the 100% design stage required appellant to submit the final design documents. Appeal File, Vol. 2-1, Exhibit 15 at 20-21.

9. Section 4.5, Construction Inspections, provides that construction inspections will be made periodically by the contracting officer and/or a designated technical representative to review compliance with the solicitation requirements. It further provides, "The lessor will remain responsible for designing, constructing, operating and maintaining the building in full accordance with the requirements of this solicitation." Appeal File, Vol. 2-1, Exhibit 15 at 21.

10. Section 4.8, Construction Documentation After Award, provides that upon request of the contracting officer, the following documentation must be provided:

> E. Heating and cooling peak load calculations.
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> F. HVAC [heating, ventilation, and air conditioning] plans and equipment specifications----HVAC duct layouts, specific HVAC zones and HVAC zone controls. All dampers including fire dampers and volume control dampers must be shown with ductwork ahead of the distribution terminal indicated in true size; automotive control diagrams showing sequence of operation of

> equipment; plans showing plumbing layouts and fixtures; riser diagrams for waste and vent lines; layout of equipment rooms showing all mechanical equipment; mechanical details; and complete equipment schedules. All HVAC calculations shall be provided to show [how] equipment to be installed can meet the specifications for the building.
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> . . . .
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> O. Before the final inspection process, the Lessor must provide evidence of the "bake-out" period, the building permit, and inspection sign-off, final HVAC testing and balancing reports, and occupancy permits. Rent shall commence when the space is accepted by the Government and a valid occupancy permits [sic] is received by the Government.

Appeal File, Vol. 2-1, Exhibit 15 at 22.

11. Section 15010, Basic Mechanical Requirements, Paragraph 1(A)(2)(b), required that animal labs have a temperature controllable between 7°C and 44°C with humidity controllable between 20% and 90% relative humidity. Appeal File, Vol. 2-1, Exhibit 15 at 154.

12. Section 15010, Basic Mechanical Requirements, Paragraph (1)(F), provides in pertinent part:

> The Central Station Air Handling Unit for the Animal Ecology Laboratory shall provide the conditions of temperature and relative humidity in the animal holding rooms necessary to support the various research projects. The quantity of air supplied and exhausted shall be adjustable from five to twenty five air changes per hour, animal holding room temperature shall be adjustable from 7°C (44.6°F) to 44°C (111.2°F), and room relative humidity shall be adjustable from 5% to 90%. The unit shall be capable of conditioning the total required air from tempered outdoor conditions to the coldest, driest air condition required by any of the rooms. The cold, dry air is ducted separately to the spaces and the selected amount metered to the rooms by constant volume, variable set point terminal units. At each room, the air is then reheated and re-humidified to the required temperature and humidity. Constant volume, variable set point terminal units shall be used on the exhaust from each room to maintain a negative pressure relationship with the corridor outside of the rooms. Motors with VFDs [variable frequency drives] shall

> drive both the supply fan on the Central Station Air Handling Unit and the exhaust fan on the roof.[1]

Appeal File, Vol. 2-1, Exhibit 15 at 155.

13. Before the best and final offers (BAFO) were submitted, appellant asked respondent for clarification regarding the humidifying units in the animal labs. To respond to appellant, the contracting officer consulted another government employee as follows: "Re: Humidifying units in the labs. Drawings call for 10 units. They are spec'd for rooms 2-4 times larger than the labs. Could smaller units be utilized, as it would save $75,000-$100,000? Please advise. . . . Need these answers ASAP. BAFO offers are do [sic] on Monday." The employee responded to the contracting officer as follows: "The labs require a tremendous amount of flexibility in the humidity control. One way to achieve this is to oversize the units. Have Acquest bid the humidity control in accordance with the documents." Appellant's Cross-Motion for Summary Relief, Exhibit A.

14. Section 01000 of the SFO, Technical Specifications, provides:

> The requirements indicated herein are to be interpreted as minimum quality standards to be followed. It is the responsibility of the Offeror to ensure that the products and systems provided meet the requirements of the Project and that the systems will provide the intended function. The following technical specification is not intended to be a complete specification for the Project, but is included to identify specific areas where the Government has specific requirements. No omission of the information from this technical specification is to imply such a system or part of a system or its installation is not required under the terms of the Contract.

Appeal File, Vol. 2-1, Exhibit 15 at 35.

15. Amendment no. 2 to the solicitation was issued on December 29, 2000, and incorporated into the lease agreement. Question no. 56 of the amendment stated: "In general, do the minimum requirements of the SFO take precedence over the Schematic Drawings?

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[1] In amendment no. 2 to the SFO, the relative humidity required in this section was changed from the originally specified "5% to 90%" to "20% to 90%," to be consistent with paragraph 1(A)(2)(b) of that same section. *See* Undisputed Fact 11.

Please advise." The answer was, "The most stringent takes precedence." Appeal File, Vol. 2-1, Exhibit 15 at 249.

16. Section 1.5 of the SFO, Fees, required the successful offeror to pay $224,359 to respondent as a "Design Cost Reimbursement Fee." Appeal File, Vol. 2-1, Exhibit 15 at 13. Appellant paid the fee by check dated November 9, 2001. Appellant's Cross-Motion for Summary Relief, Exhibit B.

17. The SFO included "Execution" paragraphs on every major system and subsystem of the building. The sections related to the animal holding rooms contained "Execution" provisions providing the method to be used to execute the design requirements. For example, Section 15010, Basic Mechanical Requirements, under Paragraph 1(A), sets forth, among other items, requirements for animal lab indoor minimum and maximum temperatures and humidity, design noise criteria, outside air ventilation, internal heat generation allowances for air conditioning load calculations, and the room ventilation rate per square foot. Item 9 in that paragraph states: "No provisions for addition or reduction of humidity are necessary, except in the animal ecology area and as noted on drawings." Paragraph 1(E)(3) states that the "[a]nimal holding laboratory ceiling exhaust grilles shall have "bag-out" filter housings to include standard 35% air filters." Appeal File, Vol. 2-1, Exhibit 15 at 154-55.

18. Through Supplemental Lease Agreement no. 6, dated July 22, 2002, the parties established July 1, 2002, as the date of occupancy and set forth the rental schedule. Appeal File, Vol. 2-2, Exhibit 21.

19. As late as December 2002, the GSA contracting officer advised appellant that, to the best of her knowledge, there were no defaults on the part of the lessor under the lease. Appeal File, Vol. 7, Exhibit 57, Tab 12.

20. In February 2003, GSA determined that the heating and ventilation systems in the animal holding rooms did not meet the performance requirements of the lease. Appeal File, Vol. 7, Exhibit 57, Tab 16. The problem was that adjacent animal holding rooms could not maintain opposite extreme temperatures at the same time.

21. Under Supplemental Lease Agreement no. 9, dated March 10, 2003, it was agreed that GSA, beginning on March 1, 2003, would deduct, from the monthly rent, the amount payable for the 3979 square feet of laboratory space (the animal holding rooms) because the space was "unuseable." The agreement stated that "[t]he square footage would be adjusted upward and added back to the total rent payable upon Lessor's completion of the

Heating, Ventilation and Air Conditioning (HVAC) systems for the Wildlife Laboratories." Both parties signed the agreement. Appeal File, Vol. 2-2, Exhibit 24.

22. To correct the problem, appellant proposed that insulation be installed. This was rejected by GSA, stating that it would reduce needed floor space. Appeal File, Vol. 7, Exhibit 57, Tab 29. The parties brainstormed on how to resolve the problem. Appellant eventually had to install additional HVAC equipment in order to correct the problem.

23. In November 2004, appellant hired the Farnsworth Group to test the mechanical equipment in the animal holding rooms to determine whether the requirements of the SFO were met. The final report states that the original equipment met the equipment requirements of the SFO, but the installed equipment did not meet the performance requirements of the SFO. For the report, Farnsworth reviewed the "SFO requirements (verbiage and 30% design documents) and the record drawings (100% construction documents)." The report further noted: " To meet the performance requirements, additional HVAC equipment was installed. With the installation of new equipment, the performance does meet the requirements of the SFO." Appeal File, Vol. 9, Exhibit 65 at 5.

24. Appellant filed a claim with the contracting officer on October 14, 2005, in the amount of $914,093.96, for the rental amount deducted by respondent, the cost of corrective work, and consultant costs. It appears that respondent was still deducting the square footage of the animal holding rooms from the rent at the time the claim was filed. Appeal File, Vol. 6, Exhibit 48.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment." *Id.* at 248. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). In considering summary relief, the court will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. "All reasonable inferences and presumptions are resolved in favor of the non-moving party." *Id.* at 255.

The mere fact that both parties have filed motions for summary relief does not warrant the granting of summary relief unless one of the moving parties proves that it is entitled to judgment as a matter of law upon facts that are not genuinely disputed. We must review the evidence submitted in support of each cross-motion and consider each party's motion on its own merits, taking care in each instance to examine the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Respondent, in its motion for partial summary relief, relies primarily upon language in the SFO, including disclaimer language in the written specifications and on the drawings, to support its contention that the design in the solicitation was not intended to be the final design upon which appellant could rely. Respondent contends that the undisputed facts establish that appellant was required by the lease to take the original conceptual design in the SFO and further design the facility to the 100% design level to meet the performance specifications. Thus, it contends that there was no implied warranty that the original design, developed only to the 30% level, would meet the performance requirements.

In support of its position, respondent relies on *United States v. Spearin*, 248 U.S. 132, 136 (1914), where the United States Supreme Court enunciated the general principle that "[i]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Respondent's Motion at 4. It, thus, argues that because respondent did not bind appellant to follow the initial design, a decision on the issue of warranty of design specifications should be rendered in its favor as a matter of law.

Appellant, in its response to the motion and in its cross-motion for summary relief, agrees that the facts recited by respondent in its motion are not in dispute, since respondent has simply quoted provisions in the SFO and lease. However, appellant sets forth additional facts which it contends are also "undisputed" and show that appellant had to construct the animal holding rooms according to detailed requirements in the SFO, which included the schematic drawings, and that GSA acted, prior to bid, and during construction, in a manner that led appellant to believe that it had to comply with the SFO and drawings that respondent drafted.

Appellant acknowledges that the language on the electrical, mechanical, and plumbing design drawings states that they are for design intent only and the lessor is responsible for the final scope, definition, and design, and that they are supplemental to the SFO. Appellant also cites language in the SFO, however, which states that: "All offers shall meet the requirements of this SFO and the associated schematic design drawings. Any proposed variances must be submitted with a specific description in writing with the offer. If the Government receives no variances, then the offer will be considered to meet all the

requirements of the SFO and associated schematic." Appellant's Cross-Motion at 4; *see* Undisputed Fact 4. Respondent states that this provision was applicable only prior to award, so that all offers would be judged using the same criteria. Respondent's Response to Appellant's Cross-Motion at 2-3.

Appellant also points to Section 4.1 of the SFO, Design Concepts Development, which provides that:

> After award, design development shall be in accordance with the specific solicitation requirements. The Contracting Officer shall have the right to reject any aspect of subsequent design development which varies from the concept and which would adversely affect the Government's use and occupancy of the space or the Government's other interests in the building. Evolutionary adaptations or changes can be proposed by either party to improve the design, subject to the Contracting Officer's approval.

Appellant's Cross-Motion at 4; *see* Undisputed Fact 8. This same section also provides that, "Design development after award will not only be in accordance with the specific solicitation requirements, but also a direct extension of the original design concept. The further design development shall retain all the functional and physical characteristics of that concept."

Appellant contends that the provisions above require any proposed change to be approved by the Government and that it was not allowed at its discretion to execute further design development that did not comply with the SFO and the schematic drawings. Respondent argues these provisions give appellant the right to change design features on the drawings to meet the performance specifications and that this supports its position that the initial design did not provide a "road map" for performance.

Appellant further cites numerous lease provisions showing that respondent specified a particular manufacturer for appellant to use and specified the sizes and placements required for various ventilation equipment. Appellant has also produced documents showing that respondent reviewed appellant's 50%, 90%, and 100% design submissions against requirements set forth in the written specifications and the drawings to determine whether appellant was in compliance with the SFO.

Appellant further points to the fact that appellant paid respondent $224,359, with a notation on the check that it was a "Design Cost Reimbursement Fee." Appellant contends that the payment was to reimburse respondent for the cost of designing the building. Respondent has not addressed whether this fact is material to the dispute, or its legal significance.

Appellant also disputes respondent's characterization of the initial design as being only to the 30% design level. Appellant's president stated, in an affidavit attached to appellant's motion as Exhibit E, that the documents did not state the design was developed only to the " 30%" level, and further, that the drawings and SFO were developed far beyond any previous design-build project he had worked on for the Government. He also stated that, at the time he submitted the cost of constructing the animal holding rooms, it would have been impossible to submit a cost without design documents upon which to base the cost, and that respondent encouraged appellant to use the design drawings provided as the basis for the offer.

Appellant, in its motion, cites a number of amendments and changes to the SFO where respondent made either a correction, clarification, or addition to the original design drawings, which facts are not disputed by respondent. Respondent, however, argues that most of the changes made to the design were proposed by appellant and that this is evidence that appellant knew that the initial design was not meant to be relied upon as the final design for the facility.

Appellant, in its motion, additionally relies upon the Farnsworth Group report. *See* Undisputed Fact 23. Appellant contends that the report evidences that 1) the SFO contained detailed requirements for the holding rooms' equipment and installation; 2) appellant complied with those requirements; and 3) the compliance failed to produce the result intended--that adjacent rooms could maintain opposite extreme temperatures at the same time.[2]

Respondent, in its reply to appellant's cross-motion, disputes that the Farnsworth Group report is evidence that the initial design, developed to the 30% design level, was warranted by the Government, since the report was examining the rooms at the 100% as-built level, which it contends was appellant's responsibility.

Appellant, in support of its position, compares the facts in this case to those in *J.E. Dunn Construction Co. v. General Services Administration*, GSBCA 14477, 00-1 BCA ¶ 30,806, in which the Board held that aluminum mullion specifications included in an architect's drawings for the fabrication and installation of a glass curtain wall were design

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[2] Appellant, in its complaint, appears to argue that the specifications did not clearly state that adjacent rooms had to maintain and withstand extreme temperatures at the same time. However, appellant seems to have dropped this position in its motion. *See* Complaint at 3, 5.

specifications rather than performance specifications, notwithstanding references to performance requirements, because they granted the contractor very little latitude to make changes. Appellant's Brief in Support of its Motion for Summary Relief, at 15-19. Respondent counters that *Dunn* is not supportive of appellant's position because in Dunn the Government supplied architectural drawings developed to the 100% level and not to the 30% level as in this case. Respondent's Response to Appellant's Cross-Motion at 22-23.

Appellant contends that the specifications were purely design specifications, while respondent contends that the specifications were purely performance specifications. Under design specifications, the Government provides precise details of the materials and manner in which the work is to be performed, from which the contractor is not permitted to deviate. Under performance specifications, the Government sets forth an objective or standard to be achieved, and the contractor is to use its own ingenuity to select the means to achieve that objective or standard of performance while assuming responsibility for meeting the contract requirements. *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Whether a specification is a design or performance specification depends upon the obligations imposed by the specification, not upon the label given to it. *Blake Construction Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993). Contracts may have both design and performance characteristics. *Id*.

Appellant acknowledges that the lease required it to submit further design drawings, but argues that it could not execute further design development that did not comply with the SFO and the schematic design developed by respondent. Respondent argues that the SFO stated performance requirements and allowed appellant to submit changes necessary to meet the performance specifications, and that this evidences that the initial design was not "set in stone," as appellant contends.

The build/lease scheme depicted in the SFO is not a model of clarity. The disclaimer language in the SFO and on the drawings provides strong support for respondent's position that appellant was not to rely on the conceptual design to construct the animal holding rooms. Also, there is no dispute that the lease required further design development by appellant, to a 100% design level. On the other hand, however, there is evidence in the record supporting appellant's position that it did not have unfettered discretion to change the initial design in order to meet the performance requirements, and that it had to work within the design parameters provided in the SFO. Respondent also stated, in its motion for partial summary relief, on page 4, that "[t]he complicated laboratory and animal holding rooms required that the Government provide a few more details in order to communicate its needs to the lessor than would normally be provided in a typical generic office build to suit." We view this as an admission by respondent that, for the animal holding rooms, the SFO specified more design requirements than would normally be provided.

Another fact that has not been put in context is that appellant paid respondent $224,359 as a "Design Cost Reimbursement Fee." Appellant argues that this payment is evidence that the design was a part of the requirements, since it was a part of the cost to appellant to construct the facility. Respondent did not address the legal implication of the payment.

Respondent also argues that, because appellant could submit changes that it believed were needed in order to meet the performance requirements, and would receive an equitable adjustment if its costs were increased or decreased, this claim is one arising under the Changes clause, and is not an issue to be decided under the theory of warranty of design specifications.

In considering a motion for summary relief, we cannot try issues of fact, i.e., weigh evidence or judge credibility, but only determine whether there are issues to be tried. *Anderson,* 477 U.S. at 249. Here, there is a genuine dispute over whether appellant, in implementing its 50%, 90%, and 100% design requirements, had the discretion to change the initial design criteria supplied by respondent in constructing the animal holding rooms. Also, respondent has not established that the design defect is one that could not have been readily discovered by appellant during its subsequent design development. *See J.E. Dunn*, 00-1 BCA at 152,093. Based upon the facts presented in the cross-motions, the law cited by the parties in support of their positions, and drawing all reasonable inferences in favor of the non-moving party, we conclude that appellant is not entitled to judgment in its favor as a matter of law, and respondent is not entitled to partial judgment, on the issue of warranty of design specifications, as a matter of law.

Decision

Appellant's **MOTION FOR SUMMARY RELIEF** is **DENIED** and respondent's **MOTION FOR PARTIAL SUMMARY RELIEF** is **DENIED**.

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BERYL S. GILMORE
Board Judge

We concur:

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ROBERT W. PARKER
Board Judge

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ALLAN H. GOODMAN
Board Judge